By Robert Aune

Changing the Rules

Can the Board of Directors Transfer Maintenance Responsibilities to Owners?

A Board of Directors may at times wish to transfer a part of the Association's maintenance responsibility to the individual owners. This can be for a variety of reasons, including a disagreement among owners as to whether and when to perform certain maintenance. Can an Association legitimately transfer maintenance responsibility from the Association to the owners? A case I recently handled, which was finally decided by the Court of Appeals in January, illustrates this situation and provides guidance as to what to do (and not to do), if a Board wishes to transfer some of the Association's maintenance responsibility to the individual owners.

The project is a planned development of about 50 lots constructed in the 1980s. The exteriors of the residences are wood-shingled, and initially the individual owners were responsible for the maintenance of the exteriors. However, in 1998 the owners voted to amend the CC&Rs, transferring responsibility for the exterior maintenance to the Association. In 2007, as

the project aged, the Board of Directors undertook what became known as the "shingle project," investigating at substantial cost whether to replace all of the exterior wood shingles. The conclusion was that it would be an extremely expensive project, requiring a special assessment, which was opposed by many owners. Instead of going forward with replacement of all of the exterior shingles, the CC&Rs were amended to transfer maintenance responsibility for the exteriors of the residences back to the individual owners. The amendment was approved by a supermajority of approximately 80% of the owners who voted.

Approximately one year after the 2008 amendment was approved, an owner, who is also an attorney, filed suit against the Association, claiming that the Association could not deprive him of his "vested right" to maintenance and repair of the exterior shingles without his individual approval (he did not vote on the proposed amendment). This owner also claimed that the Association was required to perform some unspecified "accrued maintenance" to the exterior shingles before it could transfer maintenance responsibility to owners such as himself.

After taking the deposition of the plaintiff/owner, the Association filed a motion for summary judgment, requesting that the Superior Court dismiss the owner's claim. The judge agreed and dismissed the case. The Superior Court also awarded the Association about $35,000 in attorneys fees and costs. The plaintiff/owner appealed the judgment to the Court of Appeals. He argued that he was entitled to a trial to show that there was "accrued or in-progress maintenance" at the time of the 2008 amendment to the CC&Rs, and that the Association could not change the rules regarding maintenance without first performing this maintenance. The owner also argued to the Court of Appeals that the Association was not entitled to recover attorneys fees because the Association's obligation to maintain the exteriors was a promise separate from the CC&Rs.

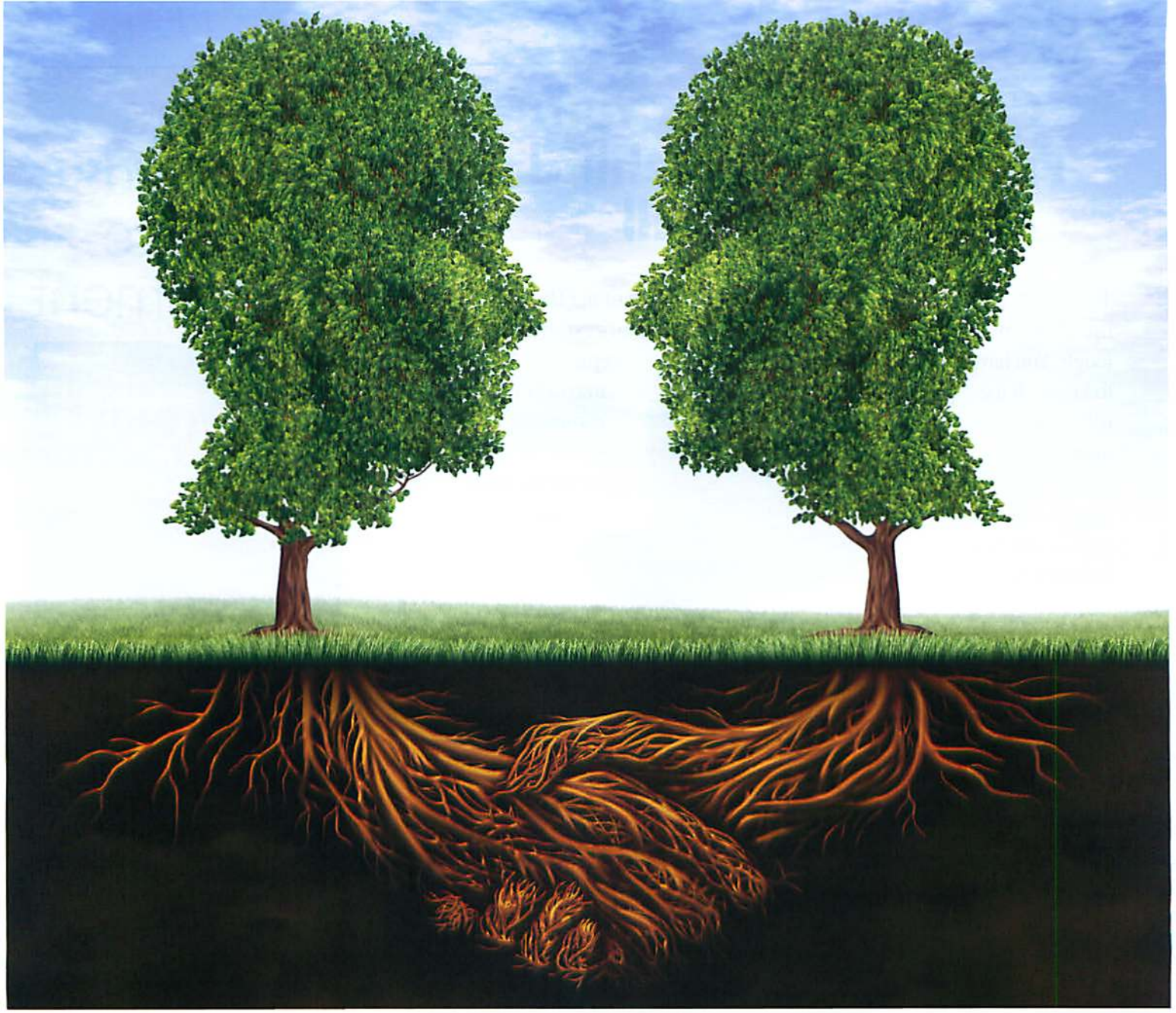
The Court of Appeals affirmed the ruling of the Superior Court, and in its opinion concluded that:

- The Owner failed to submit admissible evidence that the Association had failed to perform some specific exterior maintenance before the 2008 amendment to the CC&Rs;
- The Owner admitted that the Association had performed at least some maintenance to the exteriors before 2008;
- The Association was entitled to "judicial deference" regarding decisions by the Board of Directors as to what maintenance was performed before the 2008 amendment, relying on the Supreme Court case of *Lamden v. La Jolla Shore Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249; and
- The lawsuit was an action to enforce the governing documents because the maintenance obligations are contained in the CC&Rs, and that therefore the Association was entitled to an award of attorneys fees and costs under Civil Code section 1354.

Lessons Learned from this Case

The Association in this case was able to transfer maintenance responsibility to the owners, and the Court of Appeals approved this. However, in my opinion a Board of Directors that decides to transfer maintenance responsibility from the Association to the individual owners should do so with legal counsel from the outset, and carefully consider the following:

- Both the Superior Court and the Court of Appeals were particularly interested in whether there was any maintenance "in progress" at the time of the CC&R amendment. That is, if challenged, a court will look at whether a Board is trying to transfer a maintenance obligation to the owners that should rightfully be completed by the Association. In the case discussed above, the plaintiff/owner was not able to show either that there was maintenance being performed at the time of the amendment, or that there was specific work that should have been done;
- The larger the majority of owners approving an amendment transferring maintenance responsibility to owners, the more likely it is that the amendment will be upheld if challenged. That is, if nearly all owners are in favor of the maintenance responsibility transfer, it appears that a court will be more inclined to find the amendment valid, as in the case described above. Here the Court of Appeals emphasized that the amendment had been approved by a supermajority of owners.
- It is relatively clear that an Association may amend the governing documents to be effectively "retroactively," binding the existing owners even though the obligations are different than when they initially purchased their units (See *Posey v. Leavitt* (1991) 229 Cal.App.4th 1236);
- A Board of Directors will generally be entitled to decide what maintenance is to be performed by the Association, without second-guessing by the courts, so long as the Board acts in good faith. That is, the California Supreme Court in the *Lamden* case held that maintenance decisions by a Board of Directors, made in good faith, are entitled to



"judicial deference," and will not be second-guessed by the court. However, to minimize the chances of a successful challenge to a transfer of maintenance responsibility, it is suggested that a Board carefully document the maintenance that has been done, demonstrating that it has performed necessary maintenance before transferring responsibility to the individual owners;

- If the transfer of maintenance responsibility is challenged by an owner, the prevailing party in the resulting litigation will very likely be entitled to an award of attorneys fees and costs under Civil Code section 1354. So long as a dispute is generally related to enforcement of the governing documents, usually the CC&Rs, in my experience courts are quite willing to award attorneys fees and costs to the prevailing party.

Conclusion

Although the case I just concluded illustrates how certain maintenance responsibility can be successfully transferred from the Association to the individual owners, Boards should be particularly careful in doing so. If it is decided to transfer maintenance responsibilities to owners it is important that there be broad support among the owners. This is both to insure approval of the change, and to maximize the likelihood of prevailing if the amendment is challenged. Finally, the Board should carefully document the maintenance performed *before* the transfer, establishing that it is not transferring maintenance obligations that should have been performed by the Association. EJ

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